

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DONALD L. DAILEY, SR.,	§
	§ No. 490, 2006
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Sussex County
STATE OF DELAWARE,	§ Cr. ID No. 0210012813
	§
Plaintiff Below-	§
Appellee.	§

Submitted: January 2, 2007
Decided: February 5, 2007

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

ORDER

This 5th day of February 2007, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a),¹ it appears to the Court that:

(1) The defendant-appellant, Donald L. Dailey, Sr., filed an appeal from the Superior Court's July 25, 2006 order denying his second motion for postconviction relief pursuant to Superior Court Criminal Rule 61 and the Superior Court's August 16, 2006 order denying his motion for reconsideration. The plaintiff-appellee, the State of Delaware, has moved to

¹ The Court also has considered the appellant's response to the State's motion to affirm, which was filed with the Court's permission. Supr. Ct. R. 25(a) (iii).

affirm the Superior Court's judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit.² We agree and affirm.

(2) In August 2003, Dailey pleaded no contest to three counts of Rape in the Third Degree. The charges arose from incidents involving Dailey's two minor sons, who were forced to engage in sexual intercourse with Dailey's girlfriend while he either watched or participated. He was sentenced to 35 years of Level V incarceration, with credit for 289 days, to be suspended after 14 years for 21 years at decreasing levels of supervision. This Court affirmed Dailey's convictions and sentences on direct appeal.³

(3) In this appeal, Dailey claims that the Superior Court erred and abused its discretion by: a) enhancing his sentences based upon an erroneous factual finding; b) denying his postconviction motion without requiring his counsel to respond; and c) failing to hold an evidentiary hearing to consider his sons' recantations of their statements.

(4) Dailey's first claim is that the Superior Court based its sentences on an erroneous factual finding. Specifically, Dailey argues that the judge improperly enhanced his sentence after erroneously finding him to be a "sexual predator." The record reflects that this issue was previously

² Supr. Ct. R. 25(a).

³ *Dailey v. State*, Del. Supr., No. 438, 2003, Holland, J. (Mar. 4, 2004).

decided in Dailey’s direct appeal. There, this Court determined, first, that Dailey’s sentence was within the statutory limits and, second, that the sentencing judge did not rely on impermissible factors when sentencing Dailey.⁴ This Court held that “[t]he . . . judge’s reference to Dailey as a ‘sexual predator’ was based upon the nature of the crimes for which Dailey was being sentenced and Dailey’s criminal record. Those circumstances were proper factors to consider.” We, thus, conclude that Dailey’s first claim is procedurally barred as formerly adjudicated.⁵ Moreover, we find no evidence of a constitutional violation that would permit our consideration of the claim notwithstanding the procedural bar.⁶

(5) Dailey’s second claim is that the Superior Court improperly denied his postconviction motion without requiring his counsel to respond. In the case of a postconviction motion that alleges ineffective assistance of counsel, “[t]he [Superior Court] judge may direct the lawyer who represented the movant to respond to the allegations.”⁷ Directing counsel to respond is, thus, a matter of the Superior Court’s discretion and is not mandatory. In light of the fact that the grounds for Dailey’s current ineffective assistance of counsel claim were already addressed in his first

⁴ *Weston v. State*, 832 A.2d 742, 746 (Del. 2003).

⁵ Super. Ct. Crim. R. 61(i) (4).

⁶ Super. Ct. Crim. R. 61(i) (5).

⁷ Super. Ct. Crim. R. 61(g) (2).

postconviction motion,⁸ we find no error or abuse of discretion on the part of the Superior Court in summarily denying Dailey's second postconviction motion without requiring a response from his counsel.

(6) Dailey's third claim is that the Superior Court failed to hold an evidentiary hearing to consider his sons' recantations. This claim also was addressed in Dailey's first postconviction motion. It is, therefore, procedurally barred in this proceeding,⁹ and there is no evidence of a constitutional violation that would permit our consideration of the claim notwithstanding the procedural bar.¹⁰ The Superior Court cannot be faulted for failing to schedule an evidentiary hearing to consider Dailey's sons' recantations in the absence of any evidence that there was reason to question the veracity of their trial testimony.

(7) Finally, because there was no error or abuse of discretion on the part of the Superior Court in denying Dailey's claims, there was accordingly no basis for the Superior Court to grant Dailey's motion for reconsideration. We, therefore, find that claim likewise to be without merit.

(8) It is manifest on the face of Dailey's opening brief that the appeal is without merit because the issues presented on appeal are controlled

⁸ Super. Ct. Crim. R. 61(i) (4).

⁹ Id.

¹⁰ Super. Ct. Crim. R. 61(i) (5).

by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that, pursuant to Supreme Court Rule 25(a), the State of Delaware's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice